

No. 80974-1

80874-1

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

2008 APR 14 P 4:10

BY RONALD R. CARPENTER

CLERK

KATHIE COSTANICH,

Plaintiff/Petitioner,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Defendant/Respondent.

CLERK

BY RONALD R. CARPENTER

2008 APR 22 A 8:59

FILED
SUPREME COURT
STATE OF WASHINGTON

BRIEF OF AMICUS CURIAE
WASHINGTON STATE TRIAL LAWYERS ASSOCIATION
FOUNDATION

Kelby D. Fletcher
WSBA No. 5623
1501 4th Ave., Suite 2800
Seattle, WA 98101
(206) 624-6800

Bryan P. Harnetiaux
WSBA No. 5169
517 E. 17th Ave.
Spokane, WA 99203
(509) 624-3890

Sarah C. Schreck
WSBA No. 39417
828 W. Cliff Dr., #1
Spokane, WA 99204
(509) 475-4462

On Behalf of Washington
State Trial Lawyers
Association Foundation

FILED AS ATTACHMENT
TO E-MAIL

TABLE OF CONTENTS

	Page
I. IDENTITY AND INTEREST OF AMICUS CURIAE	1
II. INTRODUCTION AND STATEMENT OF THE CASE	1
III. ISSUE PRESENTED	2
IV. SUMMARY OF ARGUMENT	3
V. ARGUMENT	3
A. General Overview Of Washington's Equal Access To Justice Act, <i>Vis-a-Vis</i> The Traditional Culture Surrounding Statutory Attorney Fees Awards.	3
B. RCW 4.84.350 And :360 Of The EAJA Establish That Fees And Expenses Must Be Paid Incrementally, With A Separate Ceiling At Each Level Of Judicial Review.	6
C. Washington Court Of Appeals Cases Viewing The EAJA \$25,000 Limit As Cumulative Must Be Disapproved.	10
VI. CONCLUSION	12
APPENDIX	

TABLE OF AUTHORITIES

Cases	Page
<u>Alpine Lakes v. Natural Resources,</u> 102 Wn.App. 1, 979 P.2d 929 (1999)	10-11
<u>Brand v. Dep't of Labor & Indus.,</u> 139 Wn.2d 659, 989 P.2d 1111 (1999)	10
<u>Cobra Roofing v. Labor and Indus.,</u> 157 Wn.2d 90, 135 P.3d 913 (2006)	5,10
<u>Constr. Ind. Trng. v. WA Apprentice,</u> 96 Wn.App. 59, 977 P.2d 655 (1999)	8
<u>Cosmopolitan Engineering Group v. Ondeo Degremont, Inc.,</u> 159 Wn.2d 292, 149 P.3d 666 (2006)	3
<u>Costanich v. Soc. and Health Servs.,</u> 138 Wn.App. 547, 156 P.3d 232 (2007), <i>review granted</i> , 162 Wn.2d ____ (2008)	1,2
<u>Dep't of Ecology v. Campbell & Gwinn, LLC,</u> 146 Wn.2d 1, 43 P.3d 4 (2002)	6
<u>Gaglidari v. Denny's Restaurants,</u> 117 Wn.2d 426, 815 P.2d 1362 (1991)	4
<u>Galvis v. Dep't of Transp.,</u> 140 Wn.App. 693, 167 P.3d 584 (2007)	11
<u>Gonzales v. Free Speech Coalition,</u> 408 F.3d 613 (9th Cir. 2005)	11
<u>Haselwood v. Bremerton Ice Arena,</u> 137 Wn.App. 872, 155 P.3d 952 (2007)	4,11
<u>ITT Rayonier, Inc. v. Dalman,</u> 122 Wn.2d 801, 863 P.2d 64 (1993)	6
<u>Reeves v. City of Burbank,</u> 94 Cal.App. 3d 770, 156 Cal. Rptr. 667 (1979)	9
<u>Southwest Airlines Company v. Arizona Dep't of Rev.,</u> 197 Ariz. 475, 4 P.3d 1018 (2000)	8

<u>Wang v. Division of Labor Standards,</u> 219 Cal.App.3d 1152, 268 Cal.Rptr. 669 (1990)	9
--	---

Statutes and Rules

5 U.S.C. § 504	8
28 U.S.C. § 2412	8
28 U.S.C. § 2412(d)(1)(B)	8
Laws of Washington 1995, Ch. 403, §§ 901-905	5
Laws of Washington 1995, Ch. 403 § 901	5,9
Laws of Washington 1997, Ch. 409, §§ 501-503	9
A.R.S. § 12-348.G	8
Cal. C.C.P. § 1028.5	9
Cal. Government Code § 800	9
Ch. 39.76 RCW	6,7
CR 54	4
CR 58	4
RCW 4.56.115	7
RCW 4.84.010(6)	4
RCW 4.84.185	4
RCW 4.84.340	5
RCW 4.84.340-.360	<i>passim</i>
RCW 4.84.350	3,6,10
RCW 4.84.350(1)	5,6,8
RCW 4.84.350(2)	2,7,8

RCW 4.84.350(1),(2)	5
RCW 4.84.360	<i>passim</i>
RCW 4.84.370	4
RCW 4.92.160(2)	7
RCW 19.86.090	4
RCW 39.76.010(2)(a)	8
RCW 49.60.030(2)	4
RCW 50.20.160	11
RCW 50.20.190	11
RCW 51.32.215	11
RCW 51.52.120(1)	4
RCW 51.52.130	10

Other Authorities

Governor's Veto Message, Laws of Washington 1997, Ch. 409	9,10
H.B. 1032, Individual State Agency Fiscal Note, Attorney General's Office (1997)	9-10
WEBSTER'S NEW WORLD DICTIONARY (4th ed. 2003)	7

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Trial Lawyers Association Foundation (WSTLA Foundation) is a not-for-profit corporation organized under the laws of Washington, and a supporting organization of the Washington State Trial Lawyers Association (WSTLA). WSTLA Foundation, which operates the amicus curiae program formerly operated by WSTLA, has an interest in the rights of persons involved in judicial review of state administrative determinations, particularly the right of such persons to receive the full benefit of fees and expenses available under Washington's Equal Access to Justice Act (EAJA), RCW 4.84.340-.360.

II. INTRODUCTION AND STATEMENT OF THE CASE

This appeal requires interpretation of Washington's EAJA to determine the proper application of its limitation on fees and expenses. At play is a uniquely fashioned statute, which departs from the traditional culture surrounding awards of statutory fees and expenses.

The underlying facts need not be set out in detail for purposes of this brief. The relevant procedural history is drawn from the published Court of Appeals opinion and the briefing of the parties. See Costanich v. Soc. and Health Servs., 138 Wn.App. 547, 156 P.3d 232 (2007), *review granted*, 162 Wn.2d ____ (2008); Costanich Supp. Br. at 1-5; DSHS Supp. Br. at 3-4; Costanich Pet. for Rev. at 1-5 & Appendix; DSHS Ans. to Pet. for Rev. at 1-3.

Kathie Costanich (Costanich) is a foster parent whose foster care license was revoked by the Washington Department of Social and Health Services (DSHS) upon an investigation and finding that her use of profanity constituted emotional abuse of her foster children. See Costanich Supp. Br. at 2. The DSHS Board of Appeals upheld the license revocation in a final agency decision. See id.; DSHS Supp. Br. at 3.

Costanich sought judicial review in superior court, where the administrative decision was reversed and she was awarded \$25,000 in attorney fees and expenses under the EAJA. See DSHS Supp. Br. at 3; Costanich Supp. Br. at 2-3.

On appeal by DSHS, the Court of Appeals, Division I, affirmed the superior court's decision, and determined Costanich is entitled to fees and expenses on appeal under the EAJA. Costanich, 138 Wn.App. at 563-64. However, DSHS moved to modify the court commissioner's award of \$46,437 in attorney fees and costs on appeal, invoking the \$25,000 limitation in RCW 4.84.350(2). See Costanich Pet. for Rev. at 5 & Appendix D. The motion was granted and Costanich received no award of fees or costs on appeal because the statutory limit was deemed exhausted at the superior court level. See id. at 1 & Appendix D. Costanich sought review by this Court, which was granted.

III. ISSUE PRESENTED

Does the \$25,000 limit on fees and expenses found in Washington's Equal Access to Justice Act, RCW 4.84.340-.360, apply at each level of judicial review or is it cumulative in nature, encompassing all levels of judicial review?

IV. SUMMARY OF ARGUMENT

At an intuitive level, there is understandable resistance to the notion that the Washington Equal Access to Justice Act provides prevailing qualified parties a free-standing award of fees and expenses, up to \$25,000, at each level of judicial review of the underlying administrative proceeding. Usually in the litigation culture fees and expenses are cumulative in nature and abide the outcome of the case, including appeal. However, the Legislature deliberately departed from this paradigm in the EAJA. RCW 4.84.350 provides for an award of fees and expenses by *a* court. This means a separate award up to \$25,000 is available before *each* court undertaking review, in furtherance of the purposes of the act. Any doubt that RCW 4.84.350 requires this result dissolves when this statute is read in conjunction with RCW 4.84.360, which imposes on the agency involved a categorical and unyielding payment obligation, once an award of fees and expenses is announced by a court.

V. ARGUMENT

A. General Overview Of Washington's Equal Access To Justice Act, *Vis-a-Vis* The Traditional Culture Surrounding Statutory Attorney Fees Awards.

The general rule for attorney fees requires each party to bear its own litigation fees. See Cosmopolitan Engineering Group v. Ondeo Degremont, Inc., 159 Wn.2d 292, 296, 149 P.3d 666 (2006). Courts may only depart from this construct when authorized by statute, contract, or a

common law exception. See id., 159 Wn.2d at 297; see also RCW 4.84.010(6) (recognizing statutory exception). This is commonly known as fee-shifting. When provided for by statute, attorney fees typically are cumulative in nature and ancillary to a final judgment. See CR 54; CR 58; see also Gaglidari v. Denny's Restaurants, 117 Wn.2d 426, 432, 815 P.2d 1362 (1991) (noting fees will abide the ultimate outcome of proceedings on remand); Haselwood v. Bremerton Ice Arena, 137 Wn.App. 872, 891, 155 P.3d 952 (2007) (holding entitlement to statutory fees are lost when the merits are reversed on appeal).¹

These general principles guide the outcome of fee awards when the Legislature provides for recovery of attorney fees in a particular context without detailing the precise metes and bounds of the entitlement. See e.g. RCW 19.86.090 (allowing costs and fees for violation of consumer protection act); RCW 49.60.030(2) (allowing costs and fees upon proving discriminatory act). On occasion, the Legislature has articulated specific requirements or limitations on fee awards. See e.g. RCW 4.84.370 (requiring a party prevail at *all* levels of administrative and judicial review in order to recover fees); RCW 4.84.185 (delaying consideration of fees and expenses for frivolous claims until after termination of underlying case); RCW 51.52.120(1) (limiting worker's compensation attorney fees to "thirty percent of the increase in the award secured by the attorney's services").

¹ The full texts of the current versions of CR 54 and CR 58 are reproduced in the Appendix of this brief.

Washington's EAJA is an example of a carefully crafted authorization of fees and expenses to accommodate a particular purpose. See RCW 4.84.340-.360.² Its purpose is to ensure that the cost of litigation with the state does not deter certain parties lacking in resources from seeking review of unjustified agency action. See Laws of Washington 1995, Ch. 403 § 901; Cobra Roofing v. Labor and Indus., 157 Wn.2d 90, 98, 135 P.3d 913 (2006). The act allows fees and expenses, up to \$25,000, to qualified parties in a judicial review of the agency action. RCW 4.84.350(1),(2).³ A qualified party may recover fees and expenses incurred in a judicial review by prevailing on a significant issue and obtaining some benefit sought in the proceedings. See RCW 4.84.350(1). The agency may avoid liability for fees and expenses if it shows its action was substantially justified or that the particular circumstances make an award of fees and expenses unjust. See id.

Under RCW 4.84.360, an award of fees and expenses is "deemed payable on the date the court announces the award," and must be paid within sixty days. The payment is made from the particular agency's operating funds. If the award is not paid within sixty days, it is subject to

² The full text of the EAJA, Laws of Washington 1995, Ch. 403, §§ 901-905, is reproduced in the Appendix to this brief. Section 901, which is uncoded, sets forth legislative findings and the purpose of the act. Sections 902-904 are codified in RCW 4.84.340-.360, respectively. These codified statutes are also reproduced in the Appendix. Section 905 is uncoded and requires the state office of financial management to make an annual report to the Legislature.

³ RCW 4.84.340 defines "fees and other expenses" as the reasonable expenses of witnesses, study, analysis, engineering reports, tests, other projects, and attorney fees. A "qualified party" is an individual, business, or organization that meets the financial resources profile set out in the statute. See id.

interest at one percent per month. See id. (incorporating Ch. 39.76 RCW, which establishes an interest rate of one percent a month).

The question here is whether the EAJA \$25,000 ceiling on fees and expenses is incremental or cumulative in nature. The language of the EAJA is *sui generis*, calling for a construction unfettered by traditional notions governing statutory fee awards.

B. RCW 4.84.350 And .360 Of The EAJA Establish That Fees And Expenses Must Be Paid Incrementally, With A Separate Ceiling At Each Level Of Judicial Review.

This Court conducts de novo review of the meaning of statutes. Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The focus is on carrying out the purpose and intent of the Legislature. Id., 146 Wn.2d at 9. To achieve this goal, courts first evaluate the plain meaning of the statute, giving consideration to any related provisions. Id. at 11. Accordingly, the three substantive sections of Washington's EAJA, RCW 4.84.340-.360, should be construed together as an integrated whole. See id.; ITT Rayonier, Inc. v. Dalman, 122 Wn.2d 801, 807, 863 P.2d 64 (1993) (explaining statutory provisions should be read in the context of the larger statutory scheme).

Costanich's "plain language" explication of RCW 4.84.350(1) is correct. See Costanich Supp. Br. at 8. This subsection provides, "*a* court shall award a qualified party that prevails in *a* judicial review of an agency action fees and other expenses." (Emphasis added). The Legislature's conspicuous use of the indefinite article "*a*" is pivotal, as "*a*" is defined as

“one; one sort of” and “each; any one.” WEBSTER’S NEW WORLD DICTIONARY 1 (4th ed. 2003). Consequently, a plain reading of this subsection allows for *each* court to award fees and expenses to a qualified party who prevails over the state agency.

RCW 4.84.350(2) goes on to provide that an award of fees and expenses to “a qualified party under subsection (1) of this section shall not exceed twenty-five thousand dollars.” Because subsection (1) establishes that fees and expenses will be awarded separately by each court, at each level of judicial review, the \$25,000 limit correspondingly applies to each level of judicial review.

The following section, RCW 4.84.360, removes any doubt that incremental awards with individual ceilings of \$25,000 are contemplated by the act. This unique section categorically makes fees and expenses payable once “the court announces the award,” and allows sixty days for the agency to pay the award. Compare RCW 4.84.360 (making award payable within sixty day of announcement by court), with RCW 4.92.160(2) (requiring certified copy of final judgment and the attorney general’s separate certification before payment of tort judgments by the state).

The free-standing nature of the fees and expenses, and unyielding payment obligation, are further supported by the reference in RCW 4.84.360 to Ch. 39.76 RCW, imposing interest on the award after sixty days. This is not typical judgment interest, such as that provided for

in RCW 4.56.115. It is a *contract-based* interest, unique to government agency liability for public works, personal services, and the like. The sixty-day payment period in RCW 4.84.360 is similar to the thirty-day payment period in RCW 39.76.010(2)(a), triggered by a properly completed invoice or receipt.

RCW 4.84.360 is consistent with the plain language of RCW 4.84.350(1), that an award of fees and expenses is available at each level of judicial review. It is equally consistent with reading RCW 4.84.350(2) as applying the \$25,000 ceiling at each level of judicial review. Washington's EAJA departs from the traditional litigation culture surrounding statutory fee awards and, for that matter, the federal Equal Access to Justice Act, 28 U.S.C. § 2412, which tracks the more conventional approach to fee awards.⁴ See 28 U.S.C. § 2412(d)(1)(B) (allowing for cumulative fees upon submission of application "within thirty days of final judgment"); see also Constr. Ind. Trng. v. WA Apprentice, 96 Wn.App. 59, 64, 67, 977 P.2d 655 (1999) (recognizing similarities with federal EAJA but determining federal act not persuasive where provisions differ). These substantive differences reinforce the notion that Washington's EAJA is simply extraordinary in its construct,

⁴ The full text of 28 U.S.C. § 2412 is reproduced in the Appendix to this brief. (There is also another provision of the federal EAJA that addresses when fees and expenses are recoverable at the administrative level, 5 U.S.C. § 504)

requiring a reading free of the subtle influences of the traditional statutory fee awards paradigm, or the federal EAJA.⁵

The unconventional structure of the Washington EAJA reflects the Legislature's intent to provide meaningful relief to qualified parties victimized by unreasonable agency action. See Laws of Washington 1995, Ch. 403 § 901. Under RCW 4.84.340-.360, qualified parties prevailing at the initial stage of judicial review receive payment for fees and expenses up to the \$25,000 limit, and will also be eligible for a similar entitlement if the state agency seeks further judicial review and is unsuccessful. Absent this entitlement, qualified parties may be deterred from continuing to assert their rights at the next level of judicial review. The state, with its vast resources, may ultimately prevail by simple attrition. This result is avoided because the Legislature has provided for incremental awards of fees and expenses.⁶

⁵ The out-of-state cases relied upon by DSHS are similarly unhelpful in construing Washington's act, as the statutes involved do not contain similar language. See DSHS Supp. Br. at 14; Southwest Airlines Company v. Arizona Dep't of Rev., 197 Ariz. 475, 4 P.3d 1018 (2000) (interpreting A.R.S. § 12-348.G, making fees payable thirty days after award if no further review or appeal is pending); Wang v. Division of Labor Standards, 219 Cal.App.3d 1152, 268 Cal.Rptr. 669 (1990) (involving Cal. Government Code § 800 and Cal. C.C.P. § 1028.5, recognizing statutory limit is cumulative); Reeves v. City of Burbank, 94 Cal.App. 3d 770, 156 Cal. Rptr. 667 (1979) (interpreting limit in Cal. Government Code § 800 as cumulative).

⁶ In 1997 the Legislature passed amendments to the EAJA, which were ultimately vetoed by the Governor. See Laws of Washington 1997, Ch. 409, §§ 501-503. The failed 1997 legislative amendments are consistent with viewing the 1995 EAJA as allowing for incremental fee awards, with a \$25,000 limit available at each level of review. While the amendments proposed an increase in the limit, they also clarified that fees and expenses are recoverable in *each* court reviewing the administrative determination. The amendments then imposed - for the first time - an overall maximum limit.

WSTLA Foundation has been unable to find any legislative history to suggest the \$25,000 cap was ever intended to impose a cumulative limit on fees and expenses, except for agency fiscal notes describing the limit as cumulative. These fiscal notes are available at the Washington State Archives in the 1997 House Bill 1032 files. A copy of one of these notes is reproduced in the Appendix to this brief. See H.B. 1032, Individual

The construction proposed above is also consistent with the Court's general approach to interpreting attorney fee statutes in a way that furthers their underlying purpose. See Brand v. Dep't of Labor & Indus., 139 Wn.2d 659, 669-71, 989 P.2d 1111 (1999) (holding the scaling of worker's compensation fee awards under RCW 51.52.130 according to the degree of the worker's success is inconsistent with the plain language of the section and underlying purpose of the act); Cobra Roofing, 157 Wn.2d at 99 (recognizing the "primary duty in interpreting any statute is to discern and implement the intent of the legislature"). On the other hand, DSHS's view of the \$25,000 limit as cumulative, potentially leaves qualified parties who prevail at the initial level of judicial review without the resources to carry on when the state seeks further judicial review. Not everyone will be able to stay the course, as Costanich did here.⁷

C. Washington Court Of Appeals Cases Viewing The EAJA \$25,000 Limit As Cumulative Must Be Disapproved.

Washington courts have not addressed the EAJA's \$25,000 limit in any meaningful way. In Alpine Lakes v. Natural Resources, 102 Wn.App.

State Agency Fiscal Note, Attorney General's Office (1997). (The bill upon which this note is premised was amended prior to enactment). These agency notes lack any meaningful analysis, and are unpersuasive.

As explained in his veto message regarding the 1997 amendments, Governor Locke vetoed the amendments for reasons unrelated to the provisions regarding fee awards, focusing instead on limiting the EAJA to cases involving judicial review of determinations made under the Administrative Procedures Act, Ch. 34.05 RCW. See Governor's Veto Message, Laws of Washington 1997, Ch. 409, available at: <http://apps.leg.wa.gov/documents/billdocs/1997-98/Pdf/Bills/Vetoed/1032-S2.VTO.pdf> (last visited April 13, 2008).

These 1997 amendments and the Governor's veto message are reproduced in the Appendix to this brief.

⁷ Under DSHS' proposed interpretation, in a case such as this, where fees incurred at the superior court reach the \$25,000 limit, the state agency may appeal without any

I, 20, 979 P.2d 929 (1999), the Court of Appeals concluded, without discussion, that the limit in RCW 4.84.350 is cumulative, restricting the total fees on judicial review before the superior court and appellate court to \$25,000. Under the argument presented in § B, supra, this holding must be disapproved.

In another case, Galvis v. Dep't of Transp., 140 Wn.App. 693, 712, 167 P.3d 584 (2007), the Court of Appeals reversed a superior court ruling on the merits and, as a consequence, vacated the superior court award of fees under the EAJA. Reversal of this nature typically occurs only in instances where fees abide the ultimate result. See Haselwood, 137 Wn.App. at 891; Gonzales v. Free Speech Coalition, 408 F.3d 613, 622 (9th Cir. 2005) (vacating fees awarded below under federal EAJA upon finding government position was substantially justified). However, as argued in § B, supra, fee awards under the Washington's EAJA are incremental, not cumulative. Galvis is incorrect.⁸ DSHS argues that this is an absurd result. See DSHS Ans. to Pet. for Rev. at 7. It is not absurd, it is just different, and is what the Legislature ordained.⁹

additional financial risk because, if it loses, no fees and expenses are available at the next level.

⁸ Costanich appears to concede that under the EAJA fees and expenses awarded by a lower court will be lost if a party does not ultimately prevail on appeal. See Costanich Supp. Br. at 10.

⁹ The EAJA does not provide a mechanism by which an agency may recoup fees and expenses that have already been paid, in the event a case is reversed on the merits. Given the sixty-day payment obligation under RCW 4.84.360, if a prior award can be lost on appeal, it would stand to reason the Legislature would have addressed this issue. Cf. RCW 50.20.160 & .190 (establishing limited right of state to recoup overpayment of unemployment benefits). On the other hand, there is no express enabling provision that allows a state agency to delay payment due under the statute pending further review. Cf. RCW 51.32.215 (suspending duty of Department of Labor and Industries to make

While Galvis is incorrect, it is not necessary for the Court to reach this issue, as Costanich prevailed at both levels of judicial review.

VI. CONCLUSION

The Court should adopt the analysis advanced in this brief and resolve the issue addressed accordingly.

DATED this 14th day of April, 2008.

Kelby D. Fletcher *
KELBY D. FLETCHER

By
Sarah Schreck

Bryan P. Harnetiaux *
BRYAN P. HARNETIAUX

Sarah C. Schreck *
SARAH C. SCHRECK

On behalf of WSTLA Foundation

*Brief transmitted for filing by e-mail; signed original retained by counsel.

payment of benefits to claimant until at least sixty days after the compensation order has become final and is not subject to review or appeal).

APPENDIX

Rule 54
Judgments and Costs

(a) Definitions.

- (1) Judgment. A judgment is the final determination of the rights of the parties in the action and includes any decree and order from which an appeal lies. A judgment shall be in writing and signed by the judge and filed forthwith as provided in rule 58.
- (2) Order. Every direction of a court or judge, made or entered in writing, not included in a judgment, is denominated an order.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination in the judgment, supported by written findings, that there is no just reason for delay and upon an express direction for the entry of judgment. The findings may be made at the time of entry of judgment or thereafter on the court's own motion or on motion of any party. In the absence of such findings, determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(d) Costs, Disbursements, Attorney's Fees, and Expenses.

(1) Costs and Disbursements. Costs and disbursements shall be fixed and allowed as provided in RCW 4.84 or by any other applicable statute. If the party to whom costs are awarded does not file a cost bill or an affidavit detailing disbursements within 10 days after the entry of the judgment, the clerk shall tax costs and disbursements pursuant to CR 78(e).

(2) Attorney's Fees and Expenses. Claims for attorney's fees and expenses, other than costs and disbursements, shall be made by motion unless the substantive law governing the action provides for the recovery of such fees and expenses as an element of damages to be proved at trial. Unless otherwise provided by statute or order of the court, the motion must be filed no later than 10 days after entry of judgment.

(e) Preparation of Order or Judgment. The attorney of record for the prevailing party shall prepare and present a proposed form of order or judgment not later than 15 days after the entry of the verdict or decision, or at any other time as the court may direct. Where the prevailing party is represented by an attorney of record, no order or judgment may be entered for the prevailing party unless presented or approved by the attorney of record. If both the prevailing party and his attorney of record fail to prepare and present the form of order or judgment within the prescribed time, any other party may do so, without the approval of the attorney of record of the prevailing party upon notice of presentation as provided in subsection (f)(2).

(f) Presentation.

(1) Time. Judgments may be presented at the same time as the findings of fact and conclusions of law under rule 52.

(2) Notice of Presentation. No order or judgment shall be signed or entered until opposing counsel have been given 5 days' notice of presentation and served with a copy of the proposed order or judgment unless:

(A) Emergency. An emergency is shown to exist.

(B) Approval. Opposing counsel has approved in writing the entry of the proposed order or judgment or waived notice of presentation.

(C) After verdict, etc. If presentation is made after entry of verdict or findings and while opposing counsel is in open court.

[Amended effective September 1, 1989; September 1, 2007.]

Rule 58
Entry of Judgment

(a) When. Unless the court otherwise directs and subject to the provisions of rule 54(b), all judgments shall be entered immediately after they are signed by the judge.

(b) Effective Time. Judgments shall be deemed entered for all procedural purposes from the time of delivery to the clerk for filing, unless the judge earlier permits the judgment to be filed with him as authorized by rule 5(e).

(c) Notice of Entry. (Reserved. See rule 54(f).)

(d) (Reserved.)

(e) Judgment by Confession. (Reserved. See RCW 4.60.)

(f) Assignment of Judgment. (Reserved. See RCW 4.56.090.)

(g) Interest on Judgment. (Reserved. See RCW 4.56.110.)

(h) Satisfaction of Judgment. (Reserved. See RCW 4.56.100.)

(i) Lien of Judgment. (Reserved. See RCW 4.56.190.)

(j) Commencement of Lien on Real Estate. (Reserved. See RCW 4.56.200.)

(k) Cessation of Lien--Extension Prohibited. (Reserved. See RCW 4.56.210.)

(l) Revival of Judgments. (Reserved.)

PART IX

EQUAL ACCESS TO JUSTICE

NEW SECTION. Sec. 901. The legislature finds that certain individuals, smaller partnerships, smaller corporations, and other organizations may be deterred from seeking review of or defending against an unreasonable agency action because of the expense involved in securing the vindication of their rights in administrative proceedings. The legislature further finds that because of the greater resources and expertise of the state of Washington, individuals, smaller partnerships, smaller corporations, and other organizations are often deterred from seeking review of or defending against state agency actions because of the costs for attorneys, expert witnesses, and other costs. The legislature therefore adopts this equal access to justice act to ensure that these parties have a greater opportunity to defend themselves from inappropriate state agency actions and to protect their rights.

NEW SECTION. Sec. 902. A new section is added to chapter 4.84 RCW to read as follows:

Unless the context clearly requires otherwise, the definitions in this section apply throughout sections 902 through 904 of this act.

(1) "Agency" means any state board, commission, department, institution of higher education, or officer, authorized by law to make rules or to conduct adjudicative proceedings, except those in the legislative or judicial branches, the governor, or the attorney general except to the extent otherwise required by law.

(2) "Agency action" means agency action as defined by chapter 34.05 RCW.

(3) "Fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of a study, analysis, engineering report, test, or project that is found by the court to be necessary for the preparation of the party's case, and reasonable attorneys' fees. Reasonable attorneys' fees shall be based on the prevailing market rates for the kind and quality of services furnished, except that (a) no expert witness shall be compensated at a rate in excess of the highest rates of compensation for expert witnesses paid by the state of Washington, and (b) attorneys' fees shall not be awarded in excess of one hundred fifty dollars per hour unless the court determines that an

1 increase in the cost of living or a special factor, such as the limited
2 availability of qualified attorneys for the proceedings involved,
3 justifies a higher fee.

4 (4) "Judicial review" means a judicial review as defined by chapter
5 34.05 RCW.

6 (5) "Qualified party" means (a) an individual whose net worth did
7 not exceed one million dollars at the time the initial petition for
8 judicial review was filed or (b) a sole owner of an unincorporated
9 business, or a partnership, corporation, association, or organization
10 whose net worth did not exceed five million dollars at the time the
11 initial petition for judicial review was filed, except that an
12 organization described in section 501(c)(3) of the federal internal
13 revenue code of 1954 as exempt from taxation under section 501(a) of
14 the code and a cooperative association as defined in section 15(a) of
15 the agricultural marketing act (12 U.S.C. 1141j(a)), may be a party
16 regardless of the net worth of such organization or cooperative
17 association.

18 NEW SECTION. Sec. 903. A new section is added to chapter 4.84 RCW
19 to read as follows:

20 (1) Except as otherwise specifically provided by statute, a court
21 shall award a qualified party that prevails in a judicial review of an
22 agency action fees and other expenses, including reasonable attorneys'
23 fees, unless the court finds that the agency action was substantially
24 justified or that circumstances make an award unjust. A qualified
25 party shall be considered to have prevailed if the qualified party
26 obtained relief on a significant issue that achieves some benefit that
27 the qualified party sought.

28 (2) The amount awarded a qualified party under subsection (1) of
29 this section shall not exceed twenty-five thousand dollars. Subsection
30 (1) of this section shall not apply unless all parties challenging the
31 agency action are qualified parties. If two or more qualified parties
32 join in an action, the award in total shall not exceed twenty-five
33 thousand dollars. The court, in its discretion, may reduce the amount
34 to be awarded pursuant to subsection (1) of this section, or deny any
35 award, to the extent that a qualified party during the course of the
36 proceedings engaged in conduct that unduly or unreasonably protracted
37 the final resolution of the matter in controversy.

Washington Equal Access to Justice Act

RCW 4.84.340

Judicial review of agency action — Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout RCW 4.84.340 through 4.84.360.

(1) "Agency" means any state board, commission, department, institution of higher education, or officer, authorized by law to make rules or to conduct adjudicative proceedings, except those in the legislative or judicial branches, the governor, or the attorney general except to the extent otherwise required by law.

(2) "Agency action" means agency action as defined by chapter 34.05 RCW.

(3) "Fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of a study, analysis, engineering report, test, or project that is found by the court to be necessary for the preparation of the party's case, and reasonable attorneys' fees. Reasonable attorneys' fees shall be based on the prevailing market rates for the kind and quality of services furnished, except that (a) no expert witness shall be compensated at a rate in excess of the highest rates of compensation for expert witnesses paid by the state of Washington, and (b) attorneys' fees shall not be awarded in excess of one hundred fifty dollars per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

(4) "Judicial review" means a judicial review as defined by chapter 34.05 RCW.

(5) "Qualified party" means (a) an individual whose net worth did not exceed one million dollars at the time the initial petition for judicial review was filed or (b) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed five million dollars at the time the initial petition for judicial review was filed, except that an organization described in section 501(c)(3) of the federal internal revenue code of 1954 as exempt from taxation under section 501(a) of the code and a cooperative association as defined in section 15(a) of the agricultural marketing act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association.

[1995 c 403 § 902.]

RCW 4.84.350

Judicial review of agency action — Award of fees and expenses.

(1) Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

(2) The amount awarded a qualified party under subsection (1) of this section shall not exceed twenty-five thousand dollars. Subsection (1) of this section shall not apply unless all parties challenging the agency action are qualified parties. If two or more qualified parties join in an action, the award in total shall not exceed twenty-five thousand dollars. The court, in its discretion, may reduce the amount to be awarded pursuant to subsection (1) of this section, or deny any award, to the extent that a qualified party during the course of the proceedings engaged in conduct that unduly or unreasonably protracted the final resolution of the matter in controversy.

[1995 c 403 § 903.]

RCW 4.84.360

Judicial review of agency action — Payment of fees and expenses — Report to office of financial management.

Fees and other expenses awarded under RCW 4.84.340 and 4.84.350 shall be paid by the agency over which the party prevails from operating funds appropriated to the agency within sixty days. Agencies paying fees and other expenses pursuant to RCW 4.84.340 and 4.84.350 shall report all payments to the office of financial management within five days of paying the fees and other expenses. Fees and other expenses awarded by the court shall be subject to the provisions of chapter 39.76 RCW and shall be deemed payable on the date the court announces the award.

[1995 c 403 § 904.]

Federal Equal Access to Justice Act

Section 2412. Costs and fees

(a)(1) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

(2) A judgment for costs, when awarded in favor of the United States in an action brought by the United States, may include an amount equal to the filing fee prescribed under section 1914(a) of this title. The preceding sentence shall not be construed as requiring the United States to pay any filing fee.

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

(c)(1) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to any relief provided in the judgment.

(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United

States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(D) If, in a civil action brought by the United States or a proceeding for judicial review of an adversary adjudication described in section 504(a)(4) of title 5, the demand by the United States is substantially in excess of the judgment finally obtained by the United States and is unreasonable when compared with such judgment, under the facts and circumstances of the case, the court shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this subparagraph shall be paid only as a consequence of appropriations provided in advance.

(2) For the purposes of this subsection -

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no

expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of \$125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means (i) an individual whose net worth did not exceed \$2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed \$7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association or for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of title 5;

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity;

(D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

(E) "civil action brought by or against the United States" includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to the Contract Disputes Act of 1978;

(F) "court" includes the United States Court of Federal Claims and the United States Court of Appeals for Veterans Claims;

(G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement;

(H) "prevailing party", in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government; and

(I) "demand" means the express demand of the United States which led to the adversary adjudication, but shall not include a

recitation of the maximum statutory penalty (i) in the complaint, or (ii) elsewhere when accompanied by an express demand for a lesser amount.

(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

(4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

(e) The provisions of this section shall not apply to any costs, fees, and other expenses in connection with any proceeding to which section 7430 of the Internal Revenue Code of 1986 applies (determined without regard to subsections (b) and (f) of such section). Nothing in the preceding sentence shall prevent the awarding under subsection (a) of section 2412 of title 28, United States Code, of costs enumerated in section 1920 of such title (as in effect on October 1, 1981).

(f) If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at the rate determined under section 1961(a) of this title, and shall run from the date of the award through the day before the date of the mandate of affirmance.

Individual State Agency Fiscal Note

Bill Number: E2SHB 1032	Title: An act relating to regulatory reform	Agency: Attorney General's Office
----------------------------	--	--------------------------------------

Part I: Estimates

☐ No Fiscal Impact

Estimated Cash Receipts to:

Fund	Fiscal Year 98	Fiscal Year 99	1997-99 Total	99-01 Biennium	01-03 Biennium
GF-State			0		
GF-Federal			0		
Other (specify)			0		
Fund 405			0		
			0		
Total	0	0	0	0	0

Estimated Expenditures from:

	Fiscal Year 98	Fiscal Year 99	1997-99 Total	99-01 Biennium	01-03 Biennium
FTE Staff Years	0.0	0.0	0.0	0.0	0.0
Ind					
GF-State			0		
GF-Federal			0		
Other (specify)		INDETERMINATE	0		
Fund 405			0		
			0		
Total	0	0	0	0	0

The revenue and expenditure estimates on this page represent the most likely fiscal impact. Factors impacting the precision of these estimates, and alternate ranges (if appropriate), are explained in Part II.

Check applicable boxes and follow corresponding instructions:

- ☐ If fiscal impact is greater than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete entire fiscal note form Parts I-V.
- ☐ If fiscal impact is less than \$50,000 per fiscal year in the current biennium or in subsequent biennia, complete this page only (Part I).
- ☐ Capital budget impact, complete Part IV.
- ☐ Requires new rule making, complete Part V.

Legislative Contact:	Linda Steimann	Phone:	902-0573	Date:	3/6/97
Agency Preparation:	David Walsh	Phone:	753-6983	Date:	3/6/97
Agency Approval:	Virgil Sweeney	Phone:	586-0782	Date:	3/6/97
OFM Review:	<i>[Signature]</i>	Phone:	902-0562	Date:	3/11/97

97 MAR 11 P 2048

RECEIVED

Part II: Narrative Explanation

II. A - Brief Description Of What The Measure Does That Has Fiscal Impact

E2SHB 1032 is an act relating to regulatory reform. It includes a number of specific limitations on agency rulemaking, including:

- Limits the authority of the Department of Revenue to adopting procedural rules only. The Department would no longer be authorized to adopt interpretive rules;
- Establishes mandatory time limits for rules;
- Extends the more elaborate requirements for adoption of significant legislative rules (RCW 34.05.328) to the Department of Social & Health Services;
- Modifies statutory definitions and limits the scope and use of policy and interpretative statements;
- Modifies the provisions regarding legislative oversight;
- Creates a different standard for adoption of rules by the Insurance Commissioner regarding unfair and deceptive practices;
- Provides that an agency rule is invalid if it does not allow a presiding officer to consider both the statute and rules in an adjudicative proceeding.

Section 501 modifies RCW 4.84.350 which authorizes an award of attorney fees to a qualified prevailing party in a challenged agency action under RCW 34.05. Under current law, the maximum reimbursement for a qualified prevailing party is \$25,000. If a qualified party prevails in superior court and then also prevails in any subsequent appeals, the maximum amount for reimbursement remains at \$25,000. There is no provision under current law authorizing additional reimbursement of attorney fees relating to the appeal, to the extent they exceed \$25,000. Also, under current law, if a qualified party prevailed in superior court, but the decision was later reversed on appeal, then the party would not be entitled to reimbursement of attorney fees for the superior court proceedings.

Section 501 of the bill changes current law by authorizing an award of attorney fees if the qualified prevailing party in superior court also prevails in any appeals. The qualified party may recover up to \$25,000 at either the court of appeals or supreme court level, subject to an overall maximum of \$60,000. The bill also provides that a qualified party may receive an award of attorney fees in superior court even if the superior court decision is reversed on appeal.

II. B - Cash Receipts

None.

III. C - Expenditures

1. Agency legal services

Some agencies will need additional legal services for interpretation and implementation of various provisions of this bill. For instance, the Department of Social & Health Services will require additional legal services to comply with the requirements of RCW 34.05.328. The Department of Revenue will need additional attorney support to deal with the restriction on adoption of interpretive rules in section 107.

Also, because of the wording in some provisions, there could be some interpretative issues which could impact the amount of attorney time used in APA appeals, and possibly result in additional litigation for some agencies. It is difficult to estimate with specificity the full extent of legal services needs for agencies. We have assumed for this fiscal note that this bill is intended to clarify existing law regarding interpretive and policy statements, rather than create new rights or shift the burden of proof in challenges to agency actions. It is also assumed that the provision limiting the Department of Revenue to adoption of procedural rules is prospective, and would not invalidate the application of current interpretative rules to current and previous tax obligations.

2. Attorney Fees Awards

This will impose additional cost requirements for the state agencies. The agencies which would likely be impacted would be

those with a significant volume of administrative proceedings. It is difficult, however, to predict how frequently this situation could arise, and whether the agency would feel it necessary to appeal, and thereby incur the costs of appeal for the qualified party.

Section 502 provides that attorney fees awards must be paid out of monies appropriated to the agency for administration and support. This provision is applicable to attorney fee awards under RCW 34.05 in superior court and in appeals as set forth in this bill. This could have a significant negative, disproportionate impact on smaller agencies with limited budgets for administrative and support services.

executive@wiscal97a2sh1032.WP

1997 Session Law

PART V

FEES AND EXPENSES

*Sec. 501. RCW 4.84.340 and 1995 c 403 s 902 are each amended to read as follows:

Unless the context clearly requires otherwise, the definitions in this section apply throughout RCW 4.84.340 through 4.84.360.

(1) "Agency" means any state board, commission, department, institution of higher education, or officer, authorized by law to make rules or to conduct adjudicative proceedings, except those in the legislative or judicial branches, the governor, or the attorney general except to the extent otherwise required by law.

(2) "Agency action" means agency action as defined by chapter 34.05 RCW.

(3) "Fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of a study, analysis, engineering report, test, or project that is found by the court to be necessary for the preparation of the party's case, and reasonable attorneys' fees. Reasonable attorneys' fees shall be based on the prevailing market rates for the kind and quality of services furnished, except that (a) no expert witness shall be compensated at a rate in excess of the highest rates of compensation for expert witnesses paid by the state of Washington, and (b) attorneys' fees shall not be awarded in excess of one hundred fifty dollars per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

(4) "Judicial review" means (~~a judicial review as defined by chapter 34.05-RCW~~) review of an agency action in the superior court and courts of appeal.

(5) "Qualified party" means (a) an individual whose net worth did not exceed (~~one~~) two million dollars at the time the initial petition for judicial review was filed or (b) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed (~~five~~) seven million dollars at the time the initial petition for judicial review was filed, except that an organization described in section 501(c)(3) of the federal Internal Revenue Code of 1954 as exempt from taxation under section 501(a) of the code and a cooperative association as defined in section 15(a) of

1 the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party
2 regardless of the net worth of such organization or cooperative
3 association.

4 *Sec. 501 was vetoed. See message at end of chapter.

5 *Sec. 502. RCW 4.84.350 and 1995 c 403 s 903 are each amended to
6 read as follows:

7 (1) Except as otherwise specifically provided by statute, a court
8 shall award a qualified party that prevails in a judicial review of an
9 agency action fees and other expenses incurred in the judicial review,
10 including reasonable attorneys' fees, unless the court finds that ((the
11 agency action was substantially justified or that)) circumstances make
12 an award grossly unjust. A qualified party shall be considered to have
13 prevailed if the qualified party obtained relief on a significant issue
14 that achieves some benefit that the qualified party sought.

15 (2) The amount awarded a qualified party under subsection (1) of
16 this section shall not exceed ((twenty-five)) fifty thousand dollars
17 for the fees and other expenses incurred in superior court, and fifty
18 thousand dollars for the fees and other expenses incurred in each court
19 of appeal to a maximum of seventy-five thousand dollars. Subsection
20 (1) of this section shall not apply unless all parties challenging the
21 agency action are qualified parties. If two or more qualified parties
22 join in an action, the award in total shall not exceed ((twenty-five))
23 fifty thousand dollars in the superior court and fifty thousand dollars
24 in each court of appeal to a maximum of seventy-five thousand dollars.
25 The court, in its discretion, may reduce the amount to be awarded
26 pursuant to subsection (1) of this section, or deny any award, to the
27 extent that a qualified party during the course of the proceedings
28 engaged in conduct that unduly or unreasonably protracted the final
29 resolution of the matter in controversy.

30 *Sec. 502 was vetoed. See message at end of chapter.

31 *Sec. 503. RCW 4.84.360 and 1995 c 403 s 904 are each amended to
32 read as follows:

33 Fees and other expenses awarded under RCW 4.84.340 and 4.84.350
34 shall be paid by the agency over which the party prevails from
35 operating funds appropriated to the agency within ((sixty-days)) thirty
36 days of the decision of a superior court or court of appeal. The fees
37 and other expenses must be paid from moneys appropriated to the agency
38 for administration and support services and not out of moneys for

1 program activities or service delivery if the operating budget or
2 budget notes separately designate administration and support services.
3 Agencies paying fees and other expenses pursuant to RCW 4.84.340 and
4 4.84.350 shall report all payments to the office of financial
5 management within five days of paying the fees and other expenses.
6 Fees and other expenses awarded by the court shall be subject to the
7 provisions of chapter 39.76 RCW and shall be deemed payable on the date
8 the court announces the award.
9 *Sec. 503 was vetoed. See message at end of chapter.

10 PART VI
11 MISCELLANEOUS

12 Sec. 601. RCW 42.17.260 and 1995 c 397 s 11 and 1995 c 341 s 1 are
13 each reenacted and amended to read as follows:

14 (1) Each agency, in accordance with published rules, shall make
15 available for public inspection and copying all public records, unless
16 the record falls within the specific exemptions of subsection (6) of
17 this section, RCW 42.17.310, 42.17.315, or other statute which exempts
18 or prohibits disclosure of specific information or records. To the
19 extent required to prevent an unreasonable invasion of personal privacy
20 interests protected by RCW 42.17.310 and 42.17.315, an agency shall
21 delete identifying details in a manner consistent with RCW 42.17.310
22 and 42.17.315 when it makes available or publishes any public record;
23 however, in each case, the justification for the deletion shall be
24 explained fully in writing.

25 (2) For informational purposes, each agency shall publish and
26 maintain a current list containing every law, other than those listed
27 in this chapter, that the agency believes exempts or prohibits
28 disclosure of specific information or records of the agency. An
29 agency's failure to list an exemption shall not affect the efficacy of
30 any exemption.

31 (3) Each local agency shall maintain and make available for public
32 inspection and copying a current index providing identifying
33 information as to the following records issued, adopted, or promulgated
34 after January 1, 1973:

35 (a) Final opinions, including concurring and dissenting opinions,
36 as well as orders, made in the adjudication of cases;

Governor's Veto Message

VETO MESSAGE ON HB 1032-S2

May 19, 1997

To the Honorable Speaker and Members,

The House of Representatives of the State of Washington
Ladies and Gentlemen:

I am returning herewith, without my approval as to sections 101, 102, 104, 105, 106, 201, 202(9) and (10), 203, 204, 205, 207, 210, 301, 303, 304, 401, 402, 403, 404, 501, 502, 503, 602, and 604, Engrossed Second Substitute House Bill No. 1032 entitled:

"AN ACT Relating to regulatory reform;"

On March 25, 1997, I issued Executive Order 97-02, which set the stage for a thorough review of agency regulations based on need, effectiveness, clarity, statutory intent, coordination and consistency, cost, and fairness. The order also directs agencies to review their reporting requirements for businesses and their policy and interpretive statements and other similar documents. It was not by accident that I chose regulatory reform as the subject of the first executive order of my administration. It is a top priority of my office and all state agencies, and I am firmly committed to ensuring that it results in effective and meaningful regulatory improvements throughout state government.

Despite this demonstrated commitment, the legislature chose to proceed with legislation that in many cases does not measure up to what I consider effective and meaningful regulatory reform. Regulatory reform should reduce inefficiencies, conflicts, and delays in the regulatory process. It should not increase costs, cause inefficiencies, or sacrifice continued protection of our environment and the health and safety of our citizens. While some of the proposals in Engrossed Second Substitute House Bill 1032 meet these goals, many do not.

I have approved a number of provisions in the bill that I believe will improve the regulatory process. Those sections will clarify rule making authority for the Department of Labor and Industries, improve the Insurance Commissioner's procedures for adopting rules governing unfair practices, and initiate an expedited rule adoption process. Other sections that I have approved will provide better advance notice of rule making, improve opportunities for expedited repeal of rules, encourage all state agencies to engage in a formal rule review process, and provide greater public access to Department of Revenue tax determinations. I have also signed sections that set the stage for possible consolidation of agency rules on the same subject matter, remove legal ambiguities regarding judicial review of rules, provide more local government input on state agency reports, and facilitate the preparation of small business economic impact statements. I applaud the legislature for initiating these improvements to the regulatory process.

However, other sections of the bill are not consistent with meaningful and effective regulatory reform. Sections 101 and 102 would limit the authority of the Forest Practices Board to adopt rules regarding scenic beauty. Proponents argue that these sections merely clarify the current rule making authority of the Board and ensure that its authority is consistent with standards applied to other agencies. In fact, these sections could well be

interpreted as a substantive reduction of Board authority and possibly jeopardize ongoing negotiated rule making over sensitive visual impacts in the Columbia River Gorge Scenic Area. For these reasons, I have vetoed sections 101 and 102.

Sections 104 through 106 pose similar risks to the rule making authority of the Office of the Insurance Commissioner, by limiting the general rule making authority of that office. In the insurance code, effective regulatory action and consumer protection depend on a combination of specific statutory directives and general rule making authority. To eliminate general authority, as is proposed in sections 104, 105, and 106, could compromise the capacity of that agency to effectively regulate insurance companies, health care service contractors, and health maintenance organizations. In addition, sections 303 and 304 require the use of administrative law judges for adjudicative proceedings within the Office of the Insurance Commissioner. I have not been presented with sufficient evidence that the current system has created results that were unfair to aggrieved parties. It appears that existing procedures are both cost-effective and efficient. For these reasons, sections 104, 105, 106, 303, and 304 are vetoed.

Section 201 and other related sections in the bill are designed to clarify the difference between rules and other documents that agencies issue. These sections restructure the definition of "rule" within the Administrative Procedure Act (APA). Proponents believe that this language would resolve problems that businesses have when agencies issue policy statements or other documents that should be adopted as rules. I am sympathetic with these concerns and recognize that problems do exist in this area. For that reason, in Executive Order 97-02, I directed agencies to review these kinds of documents with the Attorney General's office and affected members of the regulated community, and take appropriate corrective action. I will be monitoring that effort and will determine if legislation is necessary in 1998.

I believe this problem can be more effectively addressed on an issue-by-issue basis, not by a restructuring of the definition of "rule," as is proposed in this bill. Section 201 could substantially increase rule making in areas where rules may not be the best answer for reasons of cost, timeliness and urgency of the decision, and the sheer number of decisions that must be made in many state programs. Also, sections 202(9) and (10), 301, 401, 402, 403, and 602 contain changes that cross-reference the terms "issuance" or "de facto rule" that are defined only in section 201. Since section 201 is vetoed, these changes would be confusing and obsolete. For these reasons, I have vetoed sections 201, 202(9) and (10), 301, 401, 402, 403, and 602.

Section 203 would authorize agencies to send out the contents of regulatory notices by electronic mail or fax. This was authorized in Substitute House Bill 1323, which I have already signed.

Section 204 mandates that agencies receive and accept comments on proposed rules via voice mail if they have the equipment to receive comments by this method. Current law authorizes agencies to receive comments by voice mail. This is preferable to the mandate contained in section 204.

Section 205 requires the Department of Social and Health Services to adopt a large portion of its rules using significant legislative rule making requirements. This provision is identical to one contained in Substitute House Bill 1076, which I will sign. Section 205 also provides the Joint Administrative Rules Review Committee (JARRC) with 90 days to direct an agency to adopt rules using significant legislative rule making requirements. If an agency completes rule making before the 90 days have elapsed, it is uncertain what the legal effect of the rule would be if JARRC subsequently mandates that the rule should have been adopted under these more stringent requirements. For these reasons, I have vetoed section 205.

Section 207 requires the governor's signature on every emergency rule adopted by all agencies under the general welfare criterion. This section introduces excessive bureaucratic process and paperwork into crucial agency operations. It is also impractical to require the governor to review and approve hundreds of emergency rules, many of which require a same day turn around time. For these reasons, I have vetoed section 207.

Section 210 requires a review of all newly adopted rules within seven years, and a review of existing rules after the governor's rule review is completed. Without this review, the rules would no longer be effective. This section creates a major workload that, in most cases, will duplicate rule review efforts of agencies under Executive Order 97-02. And because the requirement would be part of statutory rule adoption provisions of the APA, it could add substantial legal uncertainty and risk regarding the validity of many rules that may be subject to court challenge. For these reasons, I have vetoed section 210.

Section 301 shifts to agencies the burden of going forward with evidence in rule validity challenges. The purpose of this change is to make it easier for people with limited resources to challenge rules. While I am sympathetic to this concern, there is already provision in the APA to address the problem.

Section 404 gives five members of JARRC the power to establish a rebuttable presumption in judicial proceedings that a rule does not comply with legislative intent or was not adopted in accordance with all applicable provisions of law. The burden of proof to establish the validity of the rule would then fall to the agency, rather than to the person challenging the rule. I have vetoed this section because it violates the state Constitution, which requires that legislative acts be performed by the entire legislature with presentment to the governor for approval. It also raises constitutional separation of powers questions.

Sections 501 through 503 make major changes in the Equal Access to Justice Act, which was recently enacted in 1995 under ESHB 1010. The proposed changes expand the program to judicial review of all agency actions, not just APA issues; modify the standard for allowing attorney's fees; substantially increase awards and the net worth of persons who can qualify for awards; and make other changes regarding the payment of fees. I am not convinced that such changes are justified in a program that is less than two years old and has been applied to only a handful of cases. The current law, with its existing limits and standards, was

intended to cure the evils the legislature sought to eliminate. For these reasons, I have vetoed sections 501, 502, and 503.

Finally, section 604 requires that agencies print on their citations the entire text of laws authorizing those citations. This may turn the "ticket books" used by some agencies into rather lengthy treatises.

For these reasons, I have vetoed sections 101, 102, 104, 105, 106, 201, 202(9) and (10), 203, 204, 205, 207, 210, 301, 303, 304, 401, 402, 403, 404, 501, 502, 503, 602, and 604 of Engrossed Second Substitute House Bill 1032.

With the exceptions of sections 101, 102, 104, 105, 106, 201, 202(9) and (10), 203, 204, 205, 207, 210, 301, 303, 304, 401, 402, 403, 404, 501, 502, 503, 602, and 604, Engrossed Second Substitute House Bill 1032 is approved.

Respectfully submitted,
Gary Locke
Governor